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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 699

FAR EAST CONFERENCE, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

No. 700

PACIFIC COAST EUROPEAN CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

No. 703

FAR EAST CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 337 F. 2d 146 and reproduced as Appendix A to each petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1964. Petitions for writs of certiorari were filed in Nos. 699 and 700 on November 17, 1964, and in No. 703 on November 18, 1964. The jurisdiction of this Court is invoked in all three cases under 28 U.S.C. 1254(1) and 5 U.S.C. 1040.

QUESTIONS PRESENTED

1. Whether Section 21 of the Shipping Act, 1916, authorizes the Federal Maritime Commission to secure information prior to the institution of a formal proceeding.

2. Whether the Commission's orders provide an adequate statement of purpose to determine the relevancy of the information sought.

3. Whether the information sought is relevant to areas of responsibility conferred upon the Commission.

STATUTES INVOLVED

The relevant provisions of Sections 15, 17, 18(b)(5) and 21 of the Shipping Act, 1916, as amended (46 U.S.C. 814, 816, 817(b)(5) and 820) and Section 212(e) of the Merchant Marine Act, 1936 (46 U.S.C. 1122(f) are included in Appendix B to the petitions.

STATEMENT

Petitioners, seven shipping conferences whose members are engaged in foreign water-borne commerce as common carriers, challenge orders issued to them as agents of their member lines which require them to furnish to the Commission certain specified data in

their possession. The orders were served under Section 21 of the Shipping Act, 1916, 46 U.S.C. 820, which authorizes the Commission to require any common carrier by water, or any officer, agent or employee thereof, to file with it "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier * * *."

(a) *Nos. 699 and 700*

In these two cases the seven petitioners attack a Section 21 order served, in substantially identical form, on each petitioner as well as on other conferences, relating to rates charged by the conferences (J.A. 24–29, 75–99, 135–148, 187–192).[1] The order required the conferences to submit certain specified information dealing with rates generally as well as additional information as to a limited number of commodities (Pet. App. No. 700, pp. 4–5). It recited that under various provisions of the Shipping Act of 1916 and the Merchant Marine Act of 1936, "the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States," and summarized these responsibilities as set forth in Sections 15, 17, and 18(b)(5) of the Shipping Act and Section 212(e) of the Merchant

[1] These references are to the amended order served December 27, 1963, as set forth in the Joint Appendix in Nos. 18,468, 18,471, 18,475, and 18,477 in the court below, which has been filed in this Court.

Marine Act of 1936.[2] The order then stated that the requested information was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions * * *" (*id.* p. 6).

(b) *No. 703*

In this case the Far East Conference attacks an order requiring it to file with the Commission certain information relating to its handling of shippers' re-

[2] The order set forth the Commission's responsibilities under these provisions as follows (Pet. App. No. 700, pp. 5–6):

> Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.
>
> Under Section 212(c) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discrimination may be corrected.

quests and complaints. On December 27, 1963, the petitioner as well as 22 other shipping conferences were served with an order under Section 21 requiring them to furnish copies of, or memoranda regarding, requests and complaints by shippers received during the 5½-month period July 1 through December 15, 1963, together with copies of notices from the conferences to the shippers as to the action taken on the requests or complaints.[3] The Commission's order (Pet. App. No. 703, pp. 12a–13a) cited Section 15 of the Shipping Act and referred specifically to its requirement that the Commission disapprove an agreement upon finding a failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. The order stated that the requested information was necessary "in order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision * * *" (*id.*, p. 12a).

(c) *Proceedings below*

Petitions to reconsider and vacate the orders (JA 16–24, 99–111, 149–160, 219–235 and JA 5–14) were denied by the Commission on the ground, *inter alia*, that it could not adequately perform its statutory duties without the information sought by the orders (JA 33–39, 111–117, 160–166, 210–216, and JA 15–20). Applications for injunctions *pendente lite* were

[3] More than 30 conferences voluntarily filed such information upon request by the Commission without a Section 21 order.

thereafter filed with the court of appeals and, after hearing, were denied (JA 243–254 and JA 46–48).[4]

The cases represented herein by Nos. 699, 700 and 703 were all heard together below and the court, per Judge Fahy, rendered one opinion, upholding the validity of all the orders (Judge Miller dissenting without opinion). After referring to the broad regulatory responsibilities of the Commission and the antitrust exemption enjoyed by the conferences by reason of Commission approval of conference agreements, the court rejected petitioners' contention that Section 21 orders must be limited to formal proceedings and stated that under *Isbrandsten-Moller Co.* v. *United States*, 300 U.S. 139, 144, and *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652, Section 21 orders may be used to "aid investigation without the need for the support of a charge of violation of the Act, or belief even that such a violation is probable" (Pet. App. No. 700, pp. 7–8). The court also held that the orders contained a sufficient statement of purpose to permit a determination of relevancy and reasonableness of the information sought, noting that, unlike the orders in *Montship Lines Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147 (C.A.D.C.) and *Hellenic Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 138 (C.A.D.C.), the Commission here set forth its purposes and the need for the information with reference to particular sections of the statute (Pet. App. No. 700, pp. 9–10).

[4] Petitioners have not yet complied with the orders.

In dealing with specific objections to the orders involved in Nos. 699 and 700 (those seeking information relating to rates), the court rejected the contention that the data sought was not reasonably related to the Commission's statutory authority. It held that under Section 18(b)(5), which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States", the Commission's concern, contrary to petitioners' claim, is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, and the information sought was related to that concern. Moreover, the court pointed out, the information sought was relevant to the Commission's powers under Section 212(e) of the Shipping Act, which directs the Commission to investigate disparities between import and export rates and make recommendations to Congress by which such discrimination may be corrected (*id.*, p. 9). In respect to the order under attack in No. 703, the court held that "the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them" (*id.*, p. 11). The court therefore affirmed the Commission's orders.

ARGUMENT

This case involves only the authority of the Maritime Commission to obtain information necessary for the performance of its statutory functions relating to

rates and to procedures for handling shipper requests and compiaints. The decision below parallels the recent holding of the Court of Appeals for the Ninth Circuit in *Pacific Westbound Conference* v. *United States,* 332 F. 2d 49, which sustained an order identical in all material respects to those herein involved in Nos. 699 and 700. Another panel of the court below (Bazelon, Burger and Wright) this month unanimously upheld, *per curiam,* orders identical to that involved in No. 703. (*Pacific Westbound Conf.* v. *Federal Maritime Commission,* decided December 2, 1964, Nos. 18,592–18,594, 18,641 (Appendix, *infra*)). These decisions followed this Court's holding under the Shipping Act in *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, and are in accord with principles enunciated by the Court in the context of other regulatory statutes, *United States* v. *Morton Salt Co.,* 338 U.S. 632; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186. They are also in accord with prior decisions of other lower courts under the Shipping Act, *Kerr Steamship Co.* v. *United States,* 284 F. 2d 61 (C.A. 2);[5] *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F. 2d 147 (C.A.D.C.). The decision below is plainly correct. There is no conflict. No further review is warranted.

1. Petitioners' attack (Pet. No. 700, pp. 13–16; Pet. No. 703, pp. 14–15) on the Commission's attempt to obtain information relating to the conference's activi-

[5] In *Kerr Steamship,* certiorari was granted and the case remanded with directions to dismiss as moot, 369 U.S. 422, after the Commission vacated the order in question.

ties, without first instituting a formal proceeding to determine whether violations of the Act have occurred, is clearly without merit. This Court rejected the very same argument in *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 144–145, which held that the Commission could use the authority conferred by Section 21 to obtain information necessary to the exercise of its functions under other sections of the Act and rejected the contention that investigations by the Commission must be conducted only by means of its subpoena power under Section 27 after a hearing has been commenced. See also the cases cited in the preceding paragraph.[6]

2. Similarly, petitioners' contention that the orders in question are not relevant to any subject of legitimate inquiry by the Commission is without merit.

a. The orders in Nos. 699 and 700 requested copies of certain documents relating to petitioners' rates generally and on a limited number of commodities for a 21-month period. The request was made, as the orders said, in pursuance of the Commission's

[6] The petitioner in No. 700 attempts to rely on the failure of Congress to adopt a particular proposal of the Federal Maritime Board dealing with preliminary investigations (Pet. No. 700, pp. 14–15). However, the failure of Congress to act on this proposal may be explained by the clarification of Section 21 in the *Montship* case, *supra*, which was decided after this proposal was submitted to Congress and which made it, in part, unnecessary. H. Rep. 498, 87th Cong., 1st Sess. 23, 25; S. Rep. 860, 87th Cong., 1st Sess. 24–25. Moreover, this proposal was much broader in scope than the Commission's orders now under attack and would have provided for the swearing of witnesses and the taking of testimony antecedent to the filing of any formal proceeding (Pet. No. 700, p. 15).

responsibilities with respect to unjustly discriminatory or unfair rates under Sections 15 and 17 of the Shipping Act and rates which are so unreasonably high or low as to be detrimental to the commerce of the United States, under Section 18(b)(5) of that Act. In the light of these provisions, the court of appeals was clearly correct in holding that the Commission is properly concerned with the reasonableness of rates in foreign commerce and that the information sought was relevant to that purpose. Moreover, the court also referred, as did the orders, to "the command of Section 212(e) [of the Merchant Marine Act, 1936], which directs the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected" (Pet. App. No. 700, p. 9).

Nevertheless, petitioners attempt to show that this demand exceeded the Commission's legitimate interest in rates. In the main they claim the Commission has embarked on an unauthorized program of general "control" over the level of international freight rates (No. 699, pp. 8–12; No. 700, pp. 7–9). However, the Commission is not attempting to exercise control over any rates by these orders; it is simply asking for information so that it may determine what, if any, action within its statutory jurisdiction is appropriate.[7]

[7] Petitioners' assertion that "the production order under review was not really a study at all but a penalty, invoked as an alternative form of compliance" if petitioners failed to make certain adjustments in rates requested in a letter which accompanied the orders is erroneous. (No. 700, p. 9.) The letters had no such coercive effect. As the court of appeals found

b. The order under attack in No. 703 seeks production of copies of shippers' requests and complaints received by the conference, as well as documents reflecting the conference's handling and disposition of such requests and complaints. The demand was made, as the order said, in pursuance of the Commission's responsibility under Section 15 of the Act to disapprove any Section 15 agreement for failure or refusal of the parties thereto to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Under this provision of the Shipping Act, the Commission's concern is not limited to "procedures" in the abstract, as petitioner contends (Pet. No. 703, pp. 13–15). The manner in which petitioner actually handles requests and complaints has a vital bearing on the reasonableness of the procedure which the statute requires it to maintain. See H. Rep. 498, 87th Cong., 1st Sess., 3, 11; S. Rep. 860, 87th Cong., 1st Sess., 18. The information requested is designed to inform the Commission as to whether the Conference's procedures were reasonable in actual operation.

3. The petitioners, relying on the *Hellenic* and *Montship* cases, *supra,* also contend that the orders lacked an adequate statement of purpose and therefore violate the Fourth Amendment (Pet. No. 699, pp. 14–16; Pet. No. 703, pp. 12–17). However, unlike the orders held defective in those cases, the present orders

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"the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested." (Pet. App. No. 700, p. 7).

specifically stated that the Commission was seeking information so it might properly be informed as to matters bearing upon the responsibilities imposed upon it by Sections 15, 17 and 18(b)(5) of the Shipping Act and by Section 212(e) of the Merchant Marine Act, and further explained what these responsibilities were.[8] We submit that the court of appeals was correct when it found this statement of purpose adequate to show the relevancy of the data sought. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652.[9]

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[8] Thus, there is no conflict between the decision in this case and those in *Hellenic* and *Montship* as petitioners contend (Pet. No. 700, pp. 14–16; Pet. No. 703, pp. 12–13. Moreover, Judge Bazelon who wrote the opinion in those cases joined in a recent *per curiam* order upholding orders identical to those in No. 703. *Pacific Westbound Conference* v. *Federal Maritime Commission*, decided December 2, 1964, Nos. 18592–18594, 18,641 (Appendix, *infra*).

[9] Petitioner in No. 700 raises the additional question whether this Court's opinion in *United States* v. *Morton Salt Co.*, *supra*, should "be read as a cover of authority for any administrative demand, no matter how broad, how burdensome, or how irrelevant" (Pet. No. 700, pp. 2-3). We agree that *Morton Salt* should not be read in this manner but the question is not presented by this case. The orders, as pointed out above, were relevant to a lawful purpose, and as the court below found, there was no basis in the record for a finding of oppressiveness (Pet. App. No. 700, p. 10).

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted.

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DECEMBER 1964.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

September Term, 1964

No. 18592

PACIFIC WESTBOUND CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18593

PACIFIC COAST EUROPEAN CONFERENCE, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18594

PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, AND ITS MEMBER LINES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18641

PACIFIC/STRAITS CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

On Petitions for Review of Orders of the Federal Maritime Commission

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Before BAZELON, Chief Judge, and BURGER and WRIGHT, Circuit Judges:

JUDGMENT

These cases came on to be heard on the record from the Federal Maritime Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Federal Maritime Commission on review herein are affirmed.

Per Curiam.

Dated: Dec. 2, 1964.

Filed Dec. 2, 1964, United States Court of Appeals for the District of Columbia Circuit:

(Sgd.) NATHAN J. PAULSON, *Clerk.*

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